



**REPUBLIC OF KENYA**

**High Court at Nairobi (Nairobi Law Courts)**

**Environmental & Land Case 549 of 2008**

**CHRISTINE NYARUAI MURIUKI**

**EVERLYNE WANJIRU MURIUKI**

**(Both suing as the Administrators of the**

**Estate of Francis Charles Muriuki (deceased .....PLAINTIFFS**

**VERSUS**

**HUTCHINGSONS WANJUKI KIMAMO.....1<sup>ST</sup> DEFEDANT**

**MARY NYARUAI GITHIEYA .....2<sup>ND</sup> DEFENDANT**

**RULING**

1. The 1<sup>st</sup> and 2<sup>nd</sup> defendants/applicants hereinafter referred to as the applicants have filed a notice of motion dated 28/2/2012, under section 63(e) & 3A of the Procedure Act and all other enabling provisions of the law and powers of the court, seeking the following orders;

i. The Court order issued on 8<sup>th</sup> April 2011 providing for payment of the rental income from the suit premises into a joint interest earning bank account in the names of Kimamo Kuria Advocates and J.M. Njenga & Co. Advocates the two advocates of the parties herein be varied to provide for payment of the rent collection directly to the 1<sup>st</sup> defendant/applicant.

ii. In the alternative, this court does make such orders as it may deem appropriate in the circumstances to prevent the continued abuse of the court process and breach of the said existing order by the plaintiff/respondents.

iii. The plaintiff/respondents do within thirty (30) days from the date of the court order herein account to the 1<sup>st</sup> defendant/respondent advocates on record or otherwise as the court may direct the full sum of FKshs.4,059,000/-being the rent collection from October 2008 up to and including the month of February 2012.

iv. That such other or further orders be made as this honourable court may deem fit and just to grant.

2. The application is based on the following grounds

- a. It is now almost one year since the said order was given but the plaintiffs have refused, failed and/or neglected to comply with the said order.
- b. The plaintiffs have wrongfully appropriated to themselves over Kshs,4,059,000/- by the time of filling this application.
- c. The 1<sup>st</sup> defendant/applicant has been and continues to be denied the right to enjoy the fruits of his hard earned sweat.
- d. The plaintiff/respondents have incited the tenants not to pay rent to anyone else but themselves and attempts to levy distress have been frustrated.
- e. Such other grounds as shall be adduced at the hearing hereof.

3. Mr. Hutchinson Wanjuki Kimamo the 1<sup>st</sup> defendant filed an affidavit dated the on 28<sup>th</sup> Feb 2012. He depones as follows; he is the registered proprietor of the suit property herein known as Kabete/Lower Kabete/1225 having lawfully purchased it for valuable consideration and had it transferred to him and registered in his name on 2<sup>nd</sup> October 2008. That the respondents are denying him the rental income while the respondents were continuing to collect and appropriate it to themselves with impunity, despite the court order granted on the 8<sup>th</sup> April 2010 that the monthly rental income of the suit property be deposited in a joint interest-earning bank account in the name of the parties' advocates M/s Kimamo Kuria Advocates and J.M. Njenga & Co. Advocates pending the hearing and determination of this suit. The respondents were to give an account of the rent collected from the premises. That in breach of the said order, the respondents and/or their said advocates have refused to co-operate and facilitate the opening of a joint account as aforesaid or the collection of rent by either of the advocates on record and the respondents have continued to unlawfully receive the rent without accounting to him or to his advocates on record. That so far the respondents have collected a total sum of Kshs.4,059,000/- without accounting it to .That his advocates on record have written numerous letters to the respondents' advocates to open the bank account and/or to jointly collect the rent pending the account opening but the said advocates have refused to co-operate. He now seeks that the Court varies the orders issued on 8th April 2011 and order that the rental income be paid directly to him as leaving it otherwise will only perpetuate the respondents' continued abuse of the court process and is prejudicial to him and to the interest of justice.

4. The respondents filed grounds of oppositions. The said grounds are as follows;

i. That the application is frivolous, vexatious, bad in Law and fatally defective as the Court order sought to be varied is not attached to the application and thus the application ought to be dismissed with costs.

ii. That the prayers in the application are incapable of being granted as the order dated 2<sup>nd</sup> April 2009 which is sought to be varied is not even an order for deposit of money in a joint account but for maintenances of status quo.

iii. That the defendants/applicants are not entitled to the orders sought as the plaintiffs are contesting the ownership of the property by the 1<sup>st</sup> defendant in the main suit and the same has not been heard and determined.

iv. That the cure to the alleged complaint by the defendants/applicants does not lie in the nature of the application filed.

v. That in any event any alleged order issued in favour of the defendants/applicants regarding the issue of the deposit of rent in a joint account is the subject of an intended appeal before the court of appeal.

5. At the hearing of this application Counsels made oral submissions which I have considered together with the averments of the applicant in his supporting affidavit. It is not in dispute that an order was given by the Court on the 8<sup>th</sup> of April 2011. The said order was that the monthly rent income from L.R. No. Kabete/Lower Kabete/1225 be deposited in a joint interest earning account in the names of Messers, Kimamo Kuria Advocates and Messers, J. M. Njenga & Co. Advocates, for the parties herein pending the hearing and determination of this suit. The Court also gave an order that the plaintiff do give an account of the rental collected from the premises. It is the applicant's averments that the respondents have refused to comply with the order and that he has not been able to recover the rent despite being the owner of the premises. If a party does not comply with an order the party affected should move the Court for orders against the party who is disobeying the Court order. This the applicants have not done. The applicants have not persuaded the Court on why the orders should be varied as sought in prayer ( ii) of the application. The applicants should move the Court appropriately. The Court orders were clear and the respondents should comply with them as was ordered by the Court on the 8<sup>th</sup> April 2011. I note that there is no stay order of the orders of 8<sup>th</sup> April 2011 either from this Court or the Court of Appeal. The applicant should file an application for contempt if the respondents are disobeying the Court order. I therefore decline to grant any of the orders sought. Cost of the application shall be in the cause.

Orders accordingly.

Dated, signed and delivered this 26<sup>th</sup> Day of October 2012.

**R. OUGO**  
**JUDGE**

.....1<sup>st</sup> & 2<sup>nd</sup> Defendants/Applicants

.....1<sup>st</sup> & 2<sup>nd</sup> Plaintiffs/Respondents

.....Court Clerk